In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 245

WILLIE CALVIN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner and a co-defendant, Macias, were convicted of importing heroin, in violation of 21 U.S.C. 174. Petitioner was sentenced to five years' imprisonment (R. 73–74). The court of appeals affirmed (Pet. App. 25–30).

1. The evidence is outlined in the opinion of the court of appeals (Pet. App. 26–27). It showed that one Romney, the owner-operator of a motel located in Nogales, Arizona, had informed Customs agent Swindler that at about 9:00 p.m. on January 9, 1968, a man, claiming to be travelling on foot and without an automobile, had rented a room for two hours under the name "Louis Brown". After registering, the man was

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seen parking an automobile (subsequently checked-out as registered to petitioner) in front of the room assigned to him and entering the room. Within a short period of time, a Mexican male arrived at the motel, went into the room occupied by "Brown" and remained for less than an hour.[1]

On January 30, 1968, petitioner, thought by the motel operator to be the person who had previously registered as "Brown," registered at the motel under the name "James Smith," stating at the time that he had no vehicle. However, he was seen parking the same automobile observed on January 9, 1968, in front of the room given him. (T. 72–73, see also T. 30, 37, 40, 48). Again the motel owner contacted Customs agent Swindler, who immediately came over to the motel with other agents and set up a surveillance. Soon thereafter, petitioner received an outside telephone call, emerged from his room and drove off, followed by the Customs agents (H. 6–8, 12; T. 79–85).[2]

Within 25–30 yards from the motel, petitioner picked up a man identified at trial as Macias (T. 154–155). The two men first drove on a circuitous route through the border town of Nogales (T. 115–120, 145–146, 155–156), and then headed out of town on the main highway, going north. About 14 miles from the border, agent Swindler pulled alongside petitioner's

[1] It was stipulated at trial that one Emmett Walters had accompanied petitioner to Nogales on January 9, 1968 and had registered at the motel as "Louis Brown." Walters testified that he had met with a Mexican male at the motel to pay him for providing Walters with a prostitute. The petitioner, according to Walters was asleep in his car outside the motel (T. 277–283).

[2] "H." refers to hearing on petitioner's motion to suppress; "T." refers to the transcript of trial.

automobile and turned on a red light (T. 86); the other agents to petitioner's rear turned on sirens (T. 121). According to Swindler, petitioner's car continued at the same speed and then slowed (T. 86). Another agent testified that petitioner's car moved to the edge of the road and the right door opened and closed (T. 150).[3] Petitioner thereupon accelerated to 80 m.p.h. (he had previously been driving at a maximum speed of 60 m.p.h.), at which point Swindler forced the car off the road (T. 86–87).

After identifying themselves as Customs agents, Swindler and fellow agent Cavitt ordered the two men out of the car and frisked them for weapons. Cavitt then returned to the other agents who were searching the edge of the highway in the area where the car door had been opened. On learning that nothing had been found, Cavitt rejoined Swindler and began to search the front of the car. At that point, petitioner asked for a sweater from the back seat of the car. (T. 88) When Cavitt reached for the sweater, he discovered a package on the right rear floor of the car, which, on examination, he determined to be heroin (T. 160–161).

2. Petitioner contends that the search of his automobile was unlawful because the agents did not have probable cause to arrest him at the time they

[3] Both petitioner and Macias agreed that the door had been opened. Jackson, testifying on his own behalf, stated that Macias opened the door and threw "the stuff" out (T. 321–322, 326). Macias, who did not testify in his own defense, presented a witness who testified that in jail petitioner had said that upon seeing the red light, he threw something at Macias and told him to get rid of it (T. 390–394).

sought to stop his car by use of sirens and a flashing red light. This argument misconceives the investigative authority of customs officers in these circumstances.[4] As the court below pointed out, while the agents' suspicions did not at that point amount to probable cause, there was reason to suspect that "the occupants of the car might be carrying imported contraband," and thus proper justification "to stop the car for the purpose of questioning its occupants to resolve those suspicions" (Pet. App. 28–29).[5] See *Terry* v. *Ohio*, 392 U.S. 1, 20–23. See also *Rios* v. *United States*, 364 U.S. 253, 261–262; *Wilson* v. *Porter*, 361 F. 2d 412, 415 (C.A. 9). It was the immediate response to this legitimate attempt to stop the automobile—that is, the opening and closing of the car door in an apparent attempt to throw something out and the subsequent acceleration to 80 m.p.h.—which transformed the agents' mere suspicions into sufficient probable cause to support the arrest of petitioner and his companion (see *Sibron* v. *New York*, 392 U.S. 40, 66–67) and the search of the vehicle (cf. *Chambers* v. *Maroney*, decided June 22, 1970 (No. 830, O.T., 1969)).

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[4] As the court below pointed out (Pet. App. 26 n. 2), the Customs agents' activities did not rest upon their specific authority regarding border searches (see, *e.g.*, 19 U.S.C. 482) but rather to arrest and search under 26 U.S.C. 7607.

[5] As the trial court pointed out, the road being travelled by petitioner and his companion was "the gateway of all this narcotic business into Arizona" (see Pet. App. 28). This Court has long recognized that in cases involving smuggling notice may be taken of public facts and geographic positions. *Carroll* v. *United States*, 267 U.S. 132, 159–161; *The Apollon*, 9 Wheat 362, 374.

Petitioner's reliance upon *Henry* v. *United States,* 361 U.S. 98, is misplaced since in that case the "movements [of those] in the car had no mark of fleeing men or men acting furtively." *Henry, supra,* at 103. In the instant case, petitioner's conduct prior to the agents' attempt to detain him for questioning raised founded suspicions warranting investigation. In attempting to frustrate this investigation, petitioner and his companion engaged in conduct characteristic of narcotics smugglers attempting to destroy evidence and escape, thereby providing the officers with probable cause for the arrest and search.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.